

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **FAO (OS) No. 391/2007**

M/S VALECHA ENGINEERING LTD. Appellant
Through: Mr.A.K.Mata, Sr. Advocate with
Mr.Sanjeev Narula and Mr.Sunil Dalal
and Ms.Sangeeta, Advocates.

versus

M/S D.S. CONSTRUCTIONS LTD. Respondent
Through: Mr.R.S. Endlaw, Advocate for the
respondent.

CORAM:
HON'BLE MR. JUSTICE T.S.THAKUR
HON'BLE MS. JUSTICE VEENA BIRBAL

% **O R D E R**
01.10.2007

+ **CM No. 13520/2007**

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Heard. Allowed subject to all just exceptions.

CM No. 13519/2007

Heard. Allowed subject to all just exceptions.

FAO (OS) No. 391/2007

This appeal arises out of an order passed by a learned Single Judge of this Court whereby an application for an interim measure under Section 9 of the Arbitration & Conciliation Act, 1996 has been adjourned to 05.10.2007 for a reply to be filed by the respondent to the said application and for a possible hearing on the application.

Mr. Endlaw, counsel appearing for the respondent raised an preliminary objection to the maintainability of this appeal. He urged that since the learned Single Judge had not yet either

granted or refused to grant the interim measure prayed for by the appellant, there was no occasion for the appellant to file the present appeal. Reliance was in support of that submission placed by Mr.Endlaw upon a Division Bench of this Court in Niko Resources Limited vs. Gujarat State Petroleum Corp. 2000 (55) DRJ (DB) 654.

It is in our opinion unnecessary for us to either set out the factual background in which the controversy arose before the learned Single Judge or determine the issue relating to the maintainability of the appeal. We say so because learned counsel for the appellant has handed over to Mr.Endlaw a cheque for a sum of Rs.75 lacs, which according to the instructions received by the former from his client, is good for payment to be treated by the respondent as a payment pursuant to the bank guarantee sought to be invoked by the respondent. It is submitted on behalf of the appellant that the respondent need not now insist upon a further payment from the bank in pursuance of the bank guarantee which should be deemed to have been encashed in consideration of the amount covered by the cheque. It is further urged that this payment should not, however, prevent the learned Single Judge from examining the entitlement of the appeal to an interim order in terms of Section 9 as prayed for by the appellant and that should the learned Single Judge eventually come to the conclusion that a case for an interim measure was made out, in directing refund of the said amount to the appellant.

Mr.Endlaw, counsel appearing for the respondent company, on instructions, states that without going into question of maintainability of the present appeal and subject to the ultimate determination by the learned Single Judge of all issues relating to the prayer of the appellant for an order of restraint against encashment, the respondent would have no objection to the arrangement being suggested by the appellant. In the circumstances, therefore, we dispose of this appeal with the following directions:-

(1) The respondent shall be free to receive the amount covered by the cheque handed over in the Court today as though the said payment is being recovered by it from the bank in pursuance the bank guarantee furnished to the respondent.

(2) In case, the learned Single Judge upon a proper consideration of the application filed by the appellant eventually comes to the conclusion that a case for intervention of the Court and grant of an order of restraint against encashment under Section 9 of the Act is made out, the learned Single Judge shall be free to direct refund of the amount received by the respondent in which event the respondent would have subject to its right to challenge the said order no objection to such a refund.

(3) Since the respondent has received the amount in terms of the cheque which is on the assurance given by the appellant good for payment, it shall not pending final disposal of the application

before the learned Single Judge insist upon any further payment from the bank pursuant to the bank guarantee.

All issues relating to the maintainability of this appeal as also the merits of the controversy between the parties are left open.

A copy of this order be given dasti under the signature of the Court Master.

T.S.THAKUR, J

VEENA BIRBAL, J

OCTOBER 1, 2007
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